IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL Nos. 197 and 198 of 2006
With
CIVIL APPLICATION Nos.755 and 756 of 2006

Date of Decision: 31.01.2006

==========

NEW INDIA ASSURANCE CO.LTD - Appellant(s)
Versus
RAJABHAI VARSANGBHAI BHARVAD & 3 - Defendant(s)
(for full cause title, see next sheet)

Coram:

The Hon'ble Mr Justice Bhawani Singh, the Chief Justice

The Hon'ble Smt. Justice Abhilasha Kumari, Judge

Whether approved for reporting?

For the Appellant:

MR HASMUKH THAKKER, Advocate

For the Respondents:

None for the respondents

==========

PER:THE HON'BLE SMT.JUSTICE ABHILASHA KUMARI,(ORAL):-

1. First Appeal No.197 of 2006, arising out of M.A.C.Petition No.214 of 1996, and First

Whether reporters of Local Papers may be allowed to see the Judgment?

Appeal No.198 of 1997, arising out of M.A.C.Petition Nos.215 of 1996, have been filed by the New India Assurance Co.Ltd. against the common judgment and award dated 23.9.2005 passed by the Motor Accident Claims Tribunal, Surendranagar. Since both these appeals have been decided by a common judgment and award, the same are being heard together.

2. Briefly stated the facts, as emerge from the record of M.A.C.Petition Nos.214 and 215 of 1996, are that the accident occurred on 7.10.1995 at about 5.30 in the morning in village Sawa under Kosamba Police Station, Surat. The deceased Devuben and Vijuben alongwith other relatives were sitting in Jeep No.M.W.N.No. 1126 and going from Nasik to Chotila to visit the temple of “Mataji” at that place, prior to the incident. After visiting the said temple, they travelled in the said jeep to Velavadar. The Navratri festival

was going on during those days. After participating in the said festival on 6.10.1995 the deceased Devuben and Vijuben travelled in the jeep No.M.W.N.1126, which belonged to the uncle's son of the claimant in M.A.C.Petition No.214 of 1996, who is also the brother's son of the claimant in M.A.C.Petition No.215 of 1996. On that date, they were travelling towards Ozar village of Nasik and on 7.10.1996, the date of the accident, they reached village Sawa under Kosamba Police Station, when a luxury bus came with full speed from the wrong side and hit the jeep in which they were travelling, from behind. The jeep was travelling at medium speed as per the averments made in the claim petitions. The said jeep, on being hit by the luxury bus, fell into a ditch, since the driver of the jeep could not control it due to the impact of being hit from behind. Devuben and Vijuben, who were sitting in the jeep died on the spot and the other passengers of the jeep sustained injuries.

3. In the M.A.C.Petition No.214 of 1996

preferred by the legal representatives of deceased Devuben it was stated that the deceased was earning her living by looking after cattle and was earning Rs.1200/- per month. In view of the loss of love and affection of the deceased, who was the wife of claimant No.1 and mother of claimant Nos.2 and 3 and the emotional shock suffered by them due to the death of Devuben, a compensation of Rs.1,50,000/- was claimed by the said legal representative of the deceased Devuben. In M.A.C.Petition No.215 of 1996 it was claimed that the deceased Vijuben was earning her living by rearing cattle and doing agricultural work and earning Rs.1400/- per month. The claimants therein are the legal representatives of the deceased Vijuben, who have claimed a total of Rs.1,50,000/- as compensation for her death on the same grounds.

4. Both the claim petitions were contested by the appellant - Insurance Company. It was

contended in the written statement filed by the appellant – Insurance Company that it was the driver of the luxury bus who was responsible for the accident and the driver and owner of the jeep as well as the appellant are not at all liable to pay the compensation. The driver, owner and insurer of the luxury bus involved in the accident should have been made parties in both the claim petitions, which has not been done. The appellant has also denied the income of the deceased persons and taken the plea that the driver of the jeep did not possess a valid driving licence. The appellant has denied the liability of the Insurance Company to pay the compensation, since it is contended that the jeep involved in the accident was a carrier of goods and the deceased persons were gratuitous passengers, travelling unauthorisedly, in the jeep.

5.The Motor Accident Claims Tribunal, Surendranagar framed the issues for determination

and the first Issue was answered in the affirmative by the Motor Accident Claims Tribunal, which held that the drivers of the jeep No.MWN 1126 and the luxury bus were both negligent to the extent of 50%.

6. After discussing the facts and the evidence on record, the Motor Accident Claims Tribunal came to the conclusion that since the owner, driver and the Insurance Company of the Luxury bus were not arraigned as opponents in the claim petitions, the claim was to be satisfied only by the owner of the jeep No.M.W.N.1126, which was insured with the appellant, to the tune of 50% of the total compensation awarded. The Motor Accident Claims Tribunal awarded Rs.2,03,000/- in case of the death of Devuben. After deducting 50%, on account of the negligence of the driver of the luxury bus, a compensation of Rs.1,01,500/- was awarded to the legal heirs of deceased Devuben. Similarly in M.A.C.Petition No.215 of 1996 the legal heirs of deceased

Vijuben were awarded Rs.1,13,000/- as compensation in totality. After deducting 50% on account of the negligence of the driver of the luxury bus, the compensation of Rs.56,500/- was awarded to the legal heirs of deceased Vijuben. The Motor Accident Claims Tribunal has further clarified that since the deceased persons were travelling in the jeep insured with the appellant as gratuitous passengers, they were entitled to receive the compensation awarded and that the appellant -Insurance Company was entitled to recover such compensation from the owner of the jeep.

7. The Motor Accident Claims Tribunal has specifically noted in its judgment and award that in the first instance the claimants have not set up the plea that the luxury bus hit the jeep from behind but, has later on introduced this plea during the course of the hearing and adducing of evidence before the M.A.C.Tribunal. However, the M.A.C.Tribunal has come to the

conclusion after scrutinizing the evidence on record, both oral and documentary,that the death of Devuben and Vijuben took place due to the jeep in which they were sitting being hit from behind by the luxury bus which was coming with excessive speed, in a rash and negligent manner. The involvement of the luxury bus and the jeep in the accident causing death of Devuben and Vijuben is proved by Exh.30, which is an inquest report and Exh.31 which is the panchanama of the spot where the accident took place. The said jeep No.M.W.N.1126, blue in colour, was found lying in the ditch containing water. However, the number of the luxury bus or the name of the owner or the driver of the same is not known, since it was a hit and run accident and the said driver did not stop after the accident took place.

8. Since Jeep No.M.W.N.1126 in which the deceased Devuben and Vijuben were travelling was insured with the appellant, the appellant and other opponents were made jointly and severally

liable to pay the 50% of the amount of compensation after deducting the share of the driver of the luxury bus, who was made equally liable. Negligence was also attributed equally to the drivers of both vehicles involved in the accident.

9. The impugned judgment and award dated 23.9.2005 of the M.A.C.Tribunal, Surendranagar has been assailed before us on a number of grounds. We have heard Shri H.M.Thakker, learned counsel for the appellant and have gone through the material on record. The first contention of the learned counsel for the appellant is that the M.A.C.Tribunal has committed an error of law in directing the appellant to pay the compensation by travelling beyond the pleadings. It is contended that in the claim petitions the claimants have averred that the accident occurred on account of the rash and negligent driving on the part of the driver of the luxury bus. Therefore, the Motor Accident Claims Tribunal

ought not to have attributed negligence on the part of the driver of the jeep to the extent of 50% based on the oral evidence led by the parties, when it was not specifically pleaded. Since the driver of the luxury bus has not been made party and even in the F.I.R. it has been stated that the accident occurred due to the rash and negligent driving on the part of the driver of the luxury bus, the appellant should not have been made liable to satisfy 50% of the awarded amount on account of negligence of the driver of the jeep. In support of his contention that the finding of the M.A.C.Tribunal is based on oral evidence, which was not based on any pleadings in the claim petition, learned counsel for the appellant has relied upon AIR 1979 SC 1652 (Shankar Chakravarti v. Britannia Biscuit Co.Ltd. and another). To substantiate this contention further, another judgment cited by him is 2005 ACJ 654 (National Insurance Co.Ltd. v. Mohanjit Kaur and others) of the Punjab and Haryana High

Court.

10. In AIR 1979 SC 1652 (Shankar Chakravarti v. Britannia Biscuit Co.Ltd. and another) (supra) the point at issue is totally different and is based upon dissimilar facts. In our view, it can not be pressed into service in the facts and circumstances of the present appeals. That is a case under Section 33(2)(b) and Section 10 of the Industrial Disputes Act and which turns upon its own facts. The Supreme Court came to the conclusion that no duty is cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either under Section 10 or under Section 33 of the Industrial Disputes Act to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after decision on the preliminary issue whether the domestic inquiry was at all held and,if held whether the same was defective. In this case no opportunity of

adducing evidence was sought by the employer nor was there any pleading to the effect that no duty is cast on the Labour Court or the Industrial Tribunal suo motu to call upon the employer to adduce additional evidence to substantiate the charges. The Supreme Court further held that the High Court was in error in granting such a non sought opportunity at the stage of the Letters Patent Appeal. The facts and the point of law involved in this case are totally different from those urged in the present Appeals.

11. In 2005 ACJ 654 (National Insurance Co.Ltd. v. Mohanjit Kaur and others) (Supra) the contention of the insurance Company was that the insured vehicle was not involved in the accident and the claimant had played a fraud upon it. In this background the Punjab and Haryana High Court had come to the conclusion that the plea of fraud cannot be raised for the first time in appeal and facts not specifically pleaded cannot be proved and further that,no evidence can be taken into

consideration on facts which have not been specifically pleaded. This conclusion has been arrived at by the Division Bench of the Punjab and Haryana High Court in the peculiar facts and circumstances of that case. In the present case there is no such allegation of fraud. This judgment, in our opinion, is not at all relevant in the facts and circumstances of the present appeals.

12. Coming to the Appeals before us, although the M.A.C.Tribunal in the impugned judgment and award has taken note of the fact that the claimants have later on, during the course of hearing and adducing of evidence, introduced the plea that the accident took place due to the jeep being hit from behind by the luxury bus, which was being driven in a rash and negligent manner and with excessive speed but, at the same time this fact has also been brought on record by other documentary evidence on record and evidence has been adduced by the claimants in order to

prove that the accident took place in this precise manner. This objection was not raised by the appellant at the relevant time before the M.A.C.Tribunal and cannot be taken for the first time at the appellate stage. Moreover, the M.A.C.Tribunal, after scrutinising the entire material on record and taking note of the oral and documentary evidence, has independently came to the conclusion that the accident took place due to the jeep being hit from behind by the luxury bus, which was being driven in a rash and negligent manner, with excessive speed. This is purely a finding of fact arrived at by the M.A.C. Tribunal, which can not be interfered with at this stage.

13. As far as the contention of the learned counsel for the appellant that no evidence can be adduced on facts which have not been specifically pleaded is concerned, it is relevant to keep in mind that the Motor Vehicles Act is a beneficial

piece of legislation and such a hyper-technical approach is not warranted in order to forward the Aims and Objects of this Statute and to give effect to the legislative intent behind its enactment, which is to provide succour to the legal heirs of the deceased or compensation to the injured, as the case may be. There is no doubt regarding the factum of death of Devuben and Vijuben in the accident involving Jeep No.M.W.N.1126 and the luxury bus. The Motor Accident Claims Tribunal has come to its conclusion, after scrutinizing the material on record, that the accident, which resulted in the death of the deceased persons did, in fact, take place due to the jeep being hit from behind by the luxury bus and the drivers of both the vehicles have been held to be negligent to the tune of 50%. This conclusion is based not only on the evidence adduced by the parties but the Tribunal has also taken into consideration Exh.31, which is the panchanama of the spot where

the accident took place and the fact that the jeep was lying in a ditch at about 50 ft. from the road. Further, the FIR has also stated that the accident occurred on account of rash and negligent driving at excessive speed of the driver of the luxury bus. The Tribunal has also attributed 50% negligence to the driver of the jeep since,it has noticed that the same was also being driven at a fast speed which resulted in the loss of control by the driver of the jeep when the luxury bus hit it from behind.

14. In the light of the above discussion, the judgments cited by the learned counsel for the appellant i.e. 2005 ACJ 654 (National Insurance Co.Ltd. v. Mohanjit Kaur and others)(supra) and AIR 1979 SC 1652 (Shankar Chakravarti v. Britannia Biscuit Co.Ltd. and another) (supra) are not at all relevant given the factual matrix of the present appeals. A decision is a precedent only in the context of its own facts and it is

only the ratio of a judgment which is binding and not every observation contained in it. To that extent the judgments cited by the learned counsel for the appellant are not applicable. In (2006) 1 SCC 275 (State of Orissa and others v. Md. Illiyas) the Supreme Court has held that :

"A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct,or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See State of Orissa v. Sudhansu Sekhar Misra and Union of India v. Dhanwanti Devi.) A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act

of Parliament. In Quinn v. Leathem the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

15. In view of the above, we are unable to agree with the first contention raised by the learned counsel for the appellant.

16. The second contention raised by the learned counsel for the appellant is that the M.A.C.Tribunal ought not to have considered 50% negligence on the part of the driver of the jeep considering the size of the vehicle. It is contended that the size of the luxury bus is much bigger than the size of the jeep and, therefore, M.A.C.Tribunal ought not to have considered 50% negligence on the part of the driver of the jeep. On the very face of it, this contention of the learned counsel for the appellant does not seem to be well founded or based upon any

principle of law. Negligence can only be attributed, by looking to the facts and circumstances of a particular case, so as to come to the conclusion as to which vehicle was at fault. Negligence cannot be made proportional to the size of the vehicle or vehicles involved in the accident. It may be possible that the bigger vehicle was being driven cautiously and correctly and that the smaller one was being driven rashly and negligently, or vice versa. This can only be determined by looking into the factual aspect and peculiar circumstances of any given case and no generalisations can be made regarding it. This contention, therefore, is untenable and cannot be accepted.

17. The third contention of the learned counsel for the appellant is that the M.A.C.Tribunal committed an error of law in holding the appellant – Insurance Company responsible since the deceased were travelling as gratuitous passengers and therefore, the

question of its liability towards the third parties does not arise. In this regard the M.A.C.Tribunal, in its impugned judgment and award dated 23.9.2005 has placed reliance on 2004 AIR SCW 952 (Oriental Insurance Co.Ltd. v. Nanjappan and others) (supra). In this case the Supreme Court has held that the insurer is liable to pay the quantum of compensation fixed by the Tribunal and can recover it from the owner of the vehicle by way of execution proceedings. There can be no quarrel with this proposition of law and the contention of the learned counsel for the appellant in this regard is also negatived in view of the specific pronouncement of the Supreme Court in the above noted case. In (2001)2 SCC 491 (Oriental Insurance Co.Ltd. V. Cheruvakkara Nafeessu and others) it has been held by the Supreme Court that in cases of third party risk the insurance Company is liable to pay the whole of the awarded amount to the claimant on the basis of the contractual obligations contained in

the Clauses relating to the liability of a third party in the Policy of Insurance. However, the insurance Company can recover excess amount from the insured by way of execution proceedings. The ratio of this judgment has been relied upon by this Court in 2003(2)GLR 1684 (Oriental Fire and General Insurance Co. v. Firdos Pervez Mysorewala and others).

18. No other point has been urged before us.

19. In view of the aforesaid reasons, in our considered opinion, there is no infirmity in the impugned judgment and award dated 23.9.2005 of M.A.C.Tribunal, Surendranagar. The appeals are therefore summarily dismissed being devoid of any merit.

20. In view of the order passed in the appeals, the Civil Applications for stay of the operation and execution of the judgment and award dated 23.9.2005 do not survive and the same are disposed of accordingly.

(Bhawani Singh)
Chief Justice

(Smt.Abhilasha Kumari)
Judge

arg